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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Re: In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, Notice of Proposed Rulemaking, CC Docket No. 99-68
Comments of Prism Communication Services, Inc.

Dear Ms. Salas:

Pursuant to Section 1.419(b) of the Commission's rules, transmitted herewith, on behalf of Prism Communication Services, Inc., are an original and four copies of Reply Comments in the above-referenced proceeding. Also enclosed is a copy of these comments on diskette formatted in WordPerfect 5.1 for Windows.

A "Stamp In" copy of this filing is also enclosed. Please date-stamp the "Stamp In" copy and return it to the courier delivering this package. If there are any questions regarding this filing, please contact the undersigned counsel.

Sincerely,

Julie A. Kaminski

cc: Service List
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	**CC Docket No. 99-68**

REPLY COMMENTS OF PRISM COMMUNICATION SERVICES, INC.

Prism Communication Services, Inc. ("Prism"), formerly Transwire Communications, Inc., by and through counsel, hereby submits its reply comments on the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking in the above-referenced proceeding concerning inter-carrier compensation for Internet Service Provider ("ISP")-bound traffic.[1]

INTRODUCTION AND SUMMARY

Since the Telecommunications Act of 1996 (the "Act")[2] removed legal impediments to the entry of competitive local exchange carriers ("CLECs") into the telecommunications marketplace, the means of determining the appropriate compensation for such traffic has been relatively straightforward. State commissions nationwide have recognized that ISP-bound traffic has the same physical and cost characteristics as other voice and data traffic transported and terminated by one local exchange carrier ("LEC") for another, and, applying sections 251(b)(5) and 252(d)(2) of the 1996 Act, have uniformly

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[1] *See* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling, CC Docket No. 96-98 ("*Declaratory Ruling*") and Inter-Carrier Compensation for ISP-Bound Traffic, Notice of Proposed Rulemaking, CC Docket No. 99-68, FCC 99-38 (released February 26, 1999) ("*NPRM*").

[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

approved arrangements that treat voice, ISP-bound and all other data traffic the same for reciprocal compensation purposes. Although the Commission's pro-competitive reciprocal compensation pricing rules were not binding on the states throughout most of this period, the reasoning of the Commission's *Local Competition Order*[3] has proven to be powerful persuasive authority. Like the Commission, states have overwhelmingly concluded that transport and termination charges should either reflect efficient forward-looking costs or, if the two carriers' traffic in roughly in balance, be settled through "bill-and-keep" arrangements.

In the *Declaratory Ruling*, the Commission determined that ISP-bound traffic "is jurisdictionally mixed and appears to be largely interstate."[4] Although that finding may affect which provisions of the Act will serve as bases for the future regulation of reciprocal compensation for ISP-bound traffic, it clearly "does not in itself determine what reciprocal compensation is due" for that traffic.[5]

It is clear from three years of experience that ILECs can and will exploit regulatory ambiguities to protect their local monopolies and to impede the development of local competition. Accordingly, it is critically important that the Commission act quickly to fill the existing federal standards vacuum. Prism strongly urges the Commission to do so by requiring that its recently reinstated pricing rules governing reciprocal compensation for local traffic be applied on a uniform basis to both voice and ISP-bound traffic. This extension is a natural one that flows from the recognition that the Commission's jurisdictional classification of some ISP-bound traffic as interstate cannot change the reality that a LEC's delivery of this traffic is physically and economically indistinguishable from the delivery of voice traffic.

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[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

[4] *Declaratory Ruling* at para. 1.

[5] *Id.*

DISCUSSION

I. THE COMMISSION HAS THE AUTHORITY TO SET THE GENERAL PARAMETERS FOR INTER-CARRIER COMPENSATION FOR ISP-BOUND TRAFFIC AND ALLOW THE STATES TO IMPLEMENT SUCH A METHODOLOGY.

The Commission's tentative conclusion that national rules "regarding inter-carrier compensation for ISP-bound traffic . . . would serve the public interest" is unquestionably correct.[6] The very same rationale that motivated the Commission to adopt national pricing rules for reciprocal compensation in the *Local Competition Order* applies with equal, if not greater, force here. The *NPRM*, however, places undue emphasis on the ability of negotiations, standing alone, to establish the compensation terms of interconnection agreements.[7] Although Prism advocates the continuation of good-faith negotiations between carriers with respect to all interconnection and compensation-related matters, Prism cautions the Commission from relying too heavily upon voluntarily negotiated arrangements.

The incentives an ILEC might otherwise have to negotiate reasonable reciprocal compensation provisions (because payments could flow either way) are certainly outweighed by the ILEC's powerful incentives to take whatever steps are necessary to deny potential competitors interconnection on commercially reasonable terms.[8] Recent history, in fact, teaches that compensation for ISP-bound traffic is among the issues that are *most* strenuously contested and *least* likely to be resolved through voluntary

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[6] *NPRM* at para. 28.

[7] *Id.* (stating that "rules should reflect [the Commission's] judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts").

[8] New entrants "seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market," *Local Competition Order*, para. 141, and "ILECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. *Id.* at para. 55.

negotiation.[9] Not surprisingly, the ILECs press the Commission to rely on arms-length negotiations to determine whether any inter-carrier payments should apply to Internet calls and, if so, the appropriate compensation method.[10] Without question, the "inequality of bargaining power between incumbents and new entrants militates in favor of [strong national] rules that have the effect of equalizing bargaining power," not weak or amorphous rules that rely heavily on the success of negotiations.[11]

Several ILECs, however, have argued that the reciprocal compensation obligation contained in section 251(b)(5) only applies to local traffic, and thus, state commissions lack jurisdiction to approve or enforce agreements that govern the compensation due for ISP-bound traffic.[12] In addition, at least one ILEC has claimed that the Commission may not order the states to enforce an inter-carrier compensation program, citing the Supreme Court in *Printz v. United States.*[13] These assertions are incorrect. Regardless of the mechanism elected by the Commission, both of the Commission's proposals in the *NPRM* are consistent with its jurisdiction and authority.

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[9] *See, e.g.,* Letter from Richard J. Metzger, General Counsel for ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC at 1-2 (June 20, 1997) (cited in note 1 of the *NPRM*).

[10] See, e.g., Comments of Bell Atlantic, CC Docket 96-98/99-68, at 4-5 ("open negotiations without regulatory constraints are most likely to produce a result which provides accurate market signals and promotes competitive provision of these services). *See also* Comments of U. S. West Communications, Inc., CC Docket 96-98/99-68, at 10-12;

[11] *Local Competition Order*, para. 55. New entrants must enter into interconnection agreements because they need access to the ILECs' networks in order to compete. Due to this "inequality of bargaining power, . . . [n]egotiations between ILECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires." *Id.*

[12] *See, e.g.*, Comments of U. S. West Communications, Inc., CC Docket 96-98/99-68, at 12-16; Comments of BellSouth Corporation and BellSouth Telecommunications, Inc., CC Docket 96-98/99-68, at 4-6; Comments of Ameritech, CC Docket 96-98/99-68, at 15-20; Comments of GTE, CC Docket 96-98/99-68, at 12-15; Comments of SBC Communications, Inc., CC Docket 96-98/99-68, at 5-16.

[13] *See* Comments of Frontier Communication, CC Docket 96-98/99-68, at 9 (citing *Printz v. U.S.*, 521 U.S. 898 (1997)).

The Commission's "adoption of a rule establishing an appropriate interstate compensation mechanism"[14] does not amount to compelling state commissions "to implement, by legislation or executive action, federal regulatory programs."[15] As the Supreme Court has previously emphasized,

> the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in §252(d). It is the States that will apply those standards and implement the methodology, determining the concrete result in particular circumstances."[16]

Further, the Commission may make "compliance with federal standards [*e.g.*, for inter-carrier compensation] a precondition to continued state regulation in an otherwise pre-empted field."[17] In addition, a Commission request that state commissions "consider" federal standards, again as a precondition to continued state regulation of an otherwise pre-empted field, is also consistent with the Constitution.[18] Accordingly, reliance on *Printz* in this instance is misplaced. The Commission may adopt a federal inter-carrier compensation mechanism to be implemented by the states, consistent with the Constitution and with the FCC's enumerated powers.

II. THE COMMISSION SHOULD ADOPT RECIPROCAL COMPENSATION PRICING RULES THAT APPLY UNIFORMLY TO BOTH VOICE AND ISP-BOUND TRAFFIC.

The economically rational and pro-competitive solution to the problem of inter-carrier compensation for ISP-bound traffic is for the Commission to extend its existing reciprocal compensation rules to cover ISP-bound traffic and to require that those rules be applied uniformly to voice and ISP-

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[14] *NPRM* at para. 15.

[15] *Printz .v. U.S.*, 521 U.S. at 925.

[16] *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, 732 (1999).

[17] *Printz* , 521 U.S. at 926 (citing *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981)).

[18] *Printz*, 521 U.S. at 926 , citing *FERC v. Mississippi*, 456 U.S. 742 (1982).

bound traffic. The Commission's now revived pricing rules governing inter-carrier obligations for the transport and termination of local traffic provide an appropriate vehicle for deriving rates for the termination of ISP-bound traffic.

Many of the ILECs, however, attempt to persuade the Commission to pound the square peg of inter-carrier compensation for ISP-bound traffic into the round hole of the interstate access regime.[19] Indeed, the ILECs would have the Commission believe that FCC precedent dictates that access charge rules must govern where two LECs carry dial-up traffic between an ISP and its subscribers.[20] They reason that because the Commission has determined that ISP traffic is predominantly interstate in nature, ISP traffic should be treated as traditional interstate traffic — *i.e.*, pursuant to interstate access compensation, such as meet-point billing arrangements. The ILECs are wrong. As the Commission made clear in the *NPRM*, "the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver ISP traffic to an ISP."[21]

Indeed, the traditional access charge regime is rendered unworkable in the context of ISP traffic by the ISP/ESP exemption. Under the traditional access charge rules, the LECs which jointly provide network access for completion of an interexchange call, typically meet-point bill for these calls. That is, both LECs bill access charges to the interexchange carrier (IXC) as compensation for the use of their facilities by the IXC and thereby share the access revenues. Unlike traditional interexchange access, where the IXC pays per minute rates for access to the local exchange network, the ISPs/ESPs are exempt

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[19] *See, e.g.*, Comments of SBC Communications Inc., CC Docket 96-98/99-68, at 22-24; Comments of U. S. West Communications, Inc., CC Docket 96-98/99-68, at 3-8; Comments of BellSouth Corporation and BellSouth Telecommunications, Inc., CC Docket 96-98/99-68, at 7-9; Comments of SBC Communications, Inc., CC Docket 96-98/99-68, at 22-23.

[20] *See, e.g.*, Comments of U. S. West Communications, Inc., CC Docket 96-98/99-68, at 5-8; Comments of BellSouth Corporation and BellSouth Telecommunications, Inc., CC Docket 96-98/99-68, at 9.

[21] *NPRM* at para. 26.

from paying access charges. As such, there is no interstate revenue associated with the interstate service of transmitting ISP-bound traffic and therefore no revenue to be shared between the LECs.[22]

A mandatory bill and keep arrangement, such as that proposed by Bell Atlantic, should likewise be rejected.[23] The Commission's existing rules authorize state commissions to "impose bill-and-keep arrangements" if the amount of traffic flowing in one direction "is roughly balanced" against the amount of traffic flowing in the opposite direction "and is expected to remain so."[24] While parties should be free to negotiate any type of inter-carrier compensation, including bill-and-keep, such compensation should not be forced upon carriers if unsupported by their anticipated traffic patterns.

Where traffic is not "roughly balanced," the Commission's rules require states to establish rates on the basis of the "forward-looking economic costs" of delivering the traffic.[25] Concluding that "[s]ymmetrical compensation rates are administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective carriers," the Commission's rules require "reciprocal compensation" to "be based on the incumbent local exchange carrier's cost studies," unless the CLEC demonstrates that its costs of termination justify imposing higher rates than those charged by the ILEC.[26] The Commission's rules also require that rate structures reflect "the manner that carriers incur those costs."[27]

The ILECs have offered no justification for subjecting ISP-bound traffic to a different compensation methodology than other traffic exchanged between LECs. There is no obvious economic

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[22] Even Bell Atlantic breaks away from its Bell Operating Company brethren to concede that the shared access charge regime does not work in the context of the ISP exemption. *See* Comments of Bell Atlantic, CC Docket Nos. 96-98/99-68, at 6.

[23] Comments of Bell Atlantic, CC Docket Nos. 96-98/99-68, at 6.

[24] 47 C.F.R. §§ 51.705(a) & 51.713(b) (1998).

[25] 47 C.F.R. § 51.705(a)(1) (1998).

[26] *Local Competition Order*, paras. 1088-89. *See also* 47 C.F.R. § 51.711(b) (1998) (state commissions may establish asymmetrical rates "only if" the entrant's costs are proven to be higher than the incumbent's costs).

[27] 47 C.F.R. § 51.709 (1998).

justification for subjecting voice and data traffic to different compensation regimes. As in the *Local Competition Order*, the Commission rightly recognized in the *NPRM* that inter-carrier compensation rates for ISP-bound traffic should be based on the "cost" that "LECs incur . . . when delivering traffic to an ISP that originates on another LEC's network."[28] Only a methodology that focuses on the costs of delivery will produce the "efficient" rates that the Commission has set as a goal.[29] Despite repeated complaints about their payment obligations to CLECs for the termination of ISP-bound traffic, however, the simple fact is that the ILECs have not shown that the costs of transporting and terminating data traffic differ categorically from the costs of transporting and terminating ordinary voice traffic.[30]

The ILECs would have the Commission believe that all CLECs are only out to "game the system" and to take advantage of purported "arbitrage" opportunities available as a result of the reciprocal compensation system.[31] The Commission should not be misled by the ILECs' rhetoric, which is principally supported only by off-handed references to several internet sites. Prism is just one example of a competitive LEC which intends to offer its customers a full array of services, including local exchange service and internet access. Contrary to what the ILECs' would like the Commission to believe, all CLECs are not out to "game the system" but, rather, are seeking to compete on a level playing field in the local exchange and data services market and should be compensated for their costs of doing so.

CONCLUSION

Stability and clarity on a national level with respect to inter-carrier compensation for ISP-bound traffic is vital to the deployment of local competitive services and the viability of new and emerging

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[28] *NPRM* at para. 29.

[29] *Id.* (concluding that "efficient rates" must "reflect accurately how costs are incurred for delivering ISP-bound traffic").

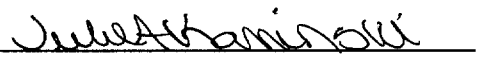
[30] *Cf. Local Competition Order*, para. 1033 ("We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions" and that therefore "the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge").

[31] See, e.g., Bell Atlantic Comments at 3-4; GTE's Comments at 8-10. SBC's Comments at pp. i-ii.

telecommunication companies. Accordingly, Prism urges the Commission to adopt federal rules to govern inter-carrier compensation for ISP-bound traffic, and to make a general pronouncement that reciprocal compensation, based on relevant costing information, is due for such traffic. Such an approach is within the Commission's jurisdiction and advances the public interest. If the Commission decides to allow the state commissions to implement the federal rule, such a determination is both reasonable and fully within the Commission's authority.

Respectfully submitted,

PRISM COMMUNICATION SERVICES, INC.



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Dated: April 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Comments of Prism Communication Services, Inc. was sent via hand-delivery to the individuals on the attached service list, this 27th day of April, 1999.

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